STATE OF MICHIGAN

COURT OF APPEALS

THERESA ODAY DeROSE, a/k/a THERESA SEYMOUR,

Plaintiff/Third-Party Defendant-Appellant,

v

JOSEPH ALLEN DeROSE,

Defendant,

and

CATHERINE DeROSE,

Third-Party Plaintiff-Appellee.

FOR PUBLICATION
January 25, 2002
9:00 a.m.

No. 232780
Wayne Circuit Court
LC No. 97-734836-DM

Updated Copy
April 12, 2002

Before: Cooper, P.J., and Sawyer and Owens, JJ.

SAWYER, J.

Plaintiff appeals by delayed application for leave to appeal granted from an order of the circuit court granting grandparent visitation in favor of third-party plaintiff Catherine DeRose (hereafter DeRose). We vacate the trial court's order.

Plaintiff and defendant were divorced after defendant admitted abusing plaintiff's daughter from a previous marriage (defendant's stepdaughter). Plaintiff and defendant did have a child in common, a daughter named Shaun Ashleigh DeRose (born April 1, 1996). The judgment of divorce granted plaintiff sole legal and physical custody of Shaun. While the action was pending, defendant's mother, third-party plaintiff DeRose, filed a petition for grandparent visitation with Shaun. Plaintiff opposed the request, citing DeRose's denial of her son's abuse of plaintiff's other daughter alleging and that it was not in Shaun's best interest to have visitation with DeRose.

The trial court granted the petition, opining in part as follows:

> But it doesn't strike me that there is any reason here that a child should be deprived of a grandmother. Grandmothers are very important. Grandmothers are very important. [sic] I don't say that just because I am one, but I do believe they are important. I have a niece who doesn't have any and she borrows grandparents and I realize this is difficult, a very difficult time for the 12-year-old, but the 12-year-old is not going to be required to see this lady. Not that it necessarily would be terrible, but I'm not saying it would be good. She is not going to see her. That's not the point.
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> This is not a motion for custody so that Shaun would be taken away from her sisters for the rest of her life or for a long period of time, even a weekend. This is like two hours of supervised visitation and I know that mom—now, I'm sure mom feels, well, I made a bad choice, I wasn't aware—this, that and the other thing. So now she wants to overcorrect.
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> It makes no sense to me that this grandmother can't have two hours of supervised visitation and even four hours of supervised visitation as recommended by the Friend of the Court and that's plenty of time to evaluate whether anything bad or wrong happens.
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> It's very troubling that the concept that somehow this whole incident can just be erased by keeping the child's actual grandmother away from her. It can't be, and everybody is going to have to learn to deal with it which is not happy, it's not good.
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> * * *
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> It doesn't strike me that a supervised visitation is wrong, so I would affirm the recommendation.

Plaintiff's sole argument on appeal is that the Michigan grandparent visitation statute, MCL 722.27b, is unconstitutional and, therefore, DeRose's petition should have been denied. We agree.

The United States Supreme Court addressed this issue in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000). In *Troxel*, the Supreme Court upheld a decision of the Washington Supreme Court that held that the Washington grandparenting visitation statute was unconstitutional because it violated the parents' fundamental rights under the federal constitution to rear their children. *Id.*, at 62-64.

The plurality opinion reviewed a series of United States Supreme Court decisions over the course of the twentieth century that recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id*. at 66. With respect to the statute at issue in *Troxel*, the plurality described it as "breathtakingly broad" and focused on three aspects: (1) that any person could petition for visitation, (2) they could do so at any time,

and (3) the trial court could grant visitation rights whenever it would serve the best interests of the child. *Id*. The Court further opined as follows:

> Section 26.10.160(3) [of the Washington Rev Code] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. [*Id.* at 67.]

Because the Michigan statute limits its scope to grandparents seeking visitation, and further restricts grandparents to petitioning for visitation only when a custody matter is otherwise before the court or when one of the parents is deceased, it does not have the broad expanse that the Washington statute did, which authorized any person at any time to file a petition. However, like the Washington statute, the Michigan statute authorizes a court to issue a visitation order to a grandparent whenever the court deems it to be in the best interests of the child. Indeed, the Michigan statute mandates that the trial court issue such an order once the court finds that grandparent visitation would be in the best interests of the child.[1] MCL 722.27b(3).

However, we do not believe the fact that the Michigan statute limits itself to allowing only grandparents under certain conditions to petition for visitation is sufficient to avoid the constitutional problems identified in *Troxel*. We again turn to the plurality opinion in *Troxel*, *supra* at 68-69, for guidance:

> First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham* [*v JR*, 442 US 584; 99 S Ct 2493; 61 L Ed 2d 101 (1979)]:
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> "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 US, at 602, 61 L Ed 2d

[1] The Washington statute merely gave the trial court discretion to enter a visitation order upon a finding that it would be in the child's best interests. *Id.* at 60.

101, 99 S Ct 2493 (alteration in original) (internal quotation marks and citations omitted).

> Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. See, *e.g.*, [*Reno v*] *Flores*, 507 US [292], at 304, 123 L Ed 2d 1, 113 S Ct 1439 [(1993)].

Furthermore, the trial court's decision in this case reflects the problem with the statute's lack of guidance. The primary theme of the trial court's decision is that "grandmothers are important" and there is no reason the child should be deprived of a grandmother. That, however, implicates the same observation made by the Supreme Court in *Troxel*, *supra* at 72, that "this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests." As the Court went on to observe, however, a court cannot intervene merely because it believes it can make a "better" decision:

> As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. [*Id.* at 72-73.]

We should also note that, in addition to the plurality opinion in *Troxel*, two of the justices wrote separately in concurring opinions. Justice Souter stated that the Court should merely have accepted the Washington Supreme Court's decision and, therefore, there was no need "to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections." *Id.* at 77 (Souter, J., concurring). Justice Souter also discussed in some detail the fact that the law entrusts the parent to make choices regarding a child's social companions. *Id.* at 77-79.

Justice Thomas also concurred, noting as follows:

> I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below. [*Id*. at 80.]

While Michigan's statute is certainly narrower in scope than Washington's in terms of standing to file a visitation petition, the Michigan statute is not narrower once a petition is properly before the trial court. It is precisely this lack of legislative guidance that renders the statute fatally flawed. Simply put, if a court in Washington cannot constitutionally be vested

with the discretion to grant visitation to a nonparent on the basis of a finding that it is in the child's best interests to do so, then a court in Michigan cannot be obligated under statute to do so on the basis of the same finding. Presumably, a grandparent visitation statute may be written in such a manner that it complies with the constitution. Indeed, the plurality opinion in *Troxel* specifically declined to hold that such statutes are unconstitutional per se. *Id.* at 73. However, the lack of any standards in the Michigan statute beyond "the best interests of the child," and specifically the failure of the statute to afford any deference to the custodial parent's decision, renders the Michigan statute unconstitutional as written.[2]

This leads us to the question whether we could and should endeavor to interpret Michigan's statute in a manner consistent with the constitution. However, such an effort would require a significant, substantive rewriting of the statute. To render the statute constitutional, we would have to read into it requirements that go beyond the text of the statute and do more than simply define the term "best interests of the child" more clearly. We would have to go from the judicial robing room to the legislative cloakroom and we decline to do so. In short, the rewriting of the grandparent visitation statute is a task best left for the Legislature.

For the above reasons, we hold that Michigan's grandparent visitation statute, MCL 722.27b, is unconstitutional. Because the trial court lacks the authority to grant relief to third-party plaintiff, a remand is unnecessary. Rather, we vacate the trial court's order granting visitation with the minor child to third-party plaintiff.

Vacated. Plaintiff may tax costs.

Owens, J., concurred.

/s/ David H. Sawyer
/s/ Donald S. Owens

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[2] In fact, MCL 722.27b(3) requires the trial court to state reasons on the record for denying grandparenting time, but the trial court is not required to state reasons for the granting of the petition.